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TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1937

No. 782

FRED G. ZERBST, WARDEN, UNITED STATES PENITENTIARY, ATLANTA, GEORGIA, PETITIONER

vs.

SHERMAN KIDWELL

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR CERTIORARI FILED FEBRUARY 10, 1938
CERTIORARI GRANTED MARCH 28, 1938

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TRANSCRIPT OF RECORD

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

No.

FRED G. ZERBST, WARDEN, UNITED STATES PENITENTIARY, ATLANTA, GEORGIA, RESPONDENT, *Appellant,* versus SHERMAN KIDWELL, PETITIONER, *Appellee.*	NO. 1192 HABEAS CORPUS

Appeal from the District Court of the United States For the Northern District of Georgia, Atlanta Division.

LAWRENCE S. CAMP, ESQ.,
United States Attorney, Atlanta, Ga.,
HARVEY. H. TYSINGER, ESQ.,
Assistant United States Attorney, Atlanta, Ga.,
H. T. NICHOLS, ESQ.,
Assistant United States Attorney, Atlanta, Ga.,
Attorneys for Appellant,

PAUL CRUTCHFIELD, ESQ, 305 Volunteer Bldg., Atlanta, Ga.,
CLINT W. HAGER, ESQ., 621 Atlanta Nat'l Bank Bldg., Atlanta, Ga.
Attorneys for Appellee.

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INDEX

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PAGE

57190—38

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IN THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF GEORGIA, ATLANTA DIVISION

SHERMAN KIDWELL, PETITIONER, v. FRED G. ZERBST, WARDEN, U. S. PENITENTIARY, ATLANTA, GEORGIA, RESPONDENT.	No. 1192 HABEAS CORPUS

PETITION FOR WRIT OF HABEAS CORPUS

Now comes Sherman Kidwell, and respectfully shows to this Honorable Court that he is a citizen of the United States and is now unlawfully held and restrained of his liberty by Fred G. Zerbst, Warden of the United States Penitentiary in Atlanta, Georgia, within the jurisdiction of this Honorable Court.

1

That your petitioner pleaded guilty in the District Court of the United States for the Eastern District of Kentucky at Frankfort, Kentucky, to having violated Secs. 12 and 39, Title 27, U. S. C. A., of unlawfully manufacturing and possessing property designed for manufacturing intoxicating liquors, and the Court, on September 27, 1932, thereupon passed upon your petitioner the following sentence:

"It is adjudged by the Court that the defendant be confined in a United States Penitentiary, or

Prison Camp, for the term of two years from this 27th day of September, A. D., 1932, and the Marshal is directed to deliver said defendant to the warden of said Penitentiary or Prison Camp, so that sentence may be executed according to law."

That your petitioner entered upon and commenced to serve said sentence on or about September 27, 1932, and served continuously on said sentence until on or about August 27, 1933, when he was granted a parole.

That your petitioner served continuously on said parole until June 29, 1935, when he was returned to a United States Penitentiary or Prison Camp, and has been continuously serving and confined in said penitentiary or prison camp since that date, and, counting the time served in a penitentiary or prison camp from on or about September 27, 1932, to the date his parole was granted, and the time served on parole, and the time served in a United States Penitentiary or Prison Camp since June 29, 1935, he has more than fully and completely served and performed the maximum and maximum remainder of his sentence as originally imposed.

Certified copies of the original judgment, sentence and final mittimus are hereto attached, marked exhibit "A", and made a part of this petition.

2.

That your petitioner was indicted by a United States Grand Jury duly impaneled and sworn within the Eastern District of Kentucky on or about May 17, 1934, and was charged with unlawfully, wilfully and feloniously

possessing a quantity of distilled spirits, to-wit, 25 gallons, more or less, of whiskey, in violation of Title 2, Sec. 201, U. S. C.

That your petitioner having pleaded guilty to said indictment on June 18, 1935, in the United States District Court for the Eastern District of Kentucky, then sitting at Lexington, Kentucky, the Court thereupon passed upon your petitioner, on June 29, 1935, the following sentence:

"Order Entered June 29, 1935,

This cause coming on for sentence, the defendants having nothing further to say, are each sentenced to be committed to the custody of the Attorney General, or his authorized representative for confinement in an institution of the Reformatory or Penitentiary type for a period of Two (2) years at Hard Labor, and they are now committed."

That your petitioner entered upon and commenced to serve said sentence on June 29, 1935, and has continuously served said sentence from that date, and has, counting the deductions from said sentence for good conduct to which petitioner is entitled by law, and also industrial good time or allowances, served said sentence in full it having been fully performed on or about January 16, 1937.

Certified copies of the original indictment, order plea of guilty, and order of sentence and commitment

are attached hereto, marked "Exhibit B", and made a part of this petition.

3.

Petitioner, from the best of his knowledge, information and belief, shows that his incarceration in the United States Penitentiary at Atlanta, Georgia, and the restraint of your petitioners liberties by the respondent herein, the Warden of said Penitentiary, is being done under the color of authority of commitments under either one of the above named sentences, and that such restraint and incarceration is illegal for that said sentences have been fully served and performed as required by law.

WHEREFORE, your petitioner prays that he be released from unlawful custody and that this Honorable Court issue its writ of habeas corpus directing the respondent herein to produce the body of your petitioner before this Honorable Court at a time and place to be specified therein, and that said respondent be required to show cause, if any he has, why your petitioner should not be released.

PAUL CRUTCHFIELD,
Attorney for Petitioner.

GEORGIA,)
FULTON COUNTY.)

Personally appeared before me, the undersigned attesting officer, Sherman Kidwell, who, after being duly sworn, deposes and says that he has read the foregoing petition, that he knows the true contents thereof, and that the allegations therein contained are true, except

as to such matters as are stated upon information and belief, and these he verily believes to be true, and that he believes he is entitled to the redress sought therein.

SHERMAN KIDWELL, *Petitioner.*

Georgia, Fulton County.

Sworn to and subscribed before me
this 23rd day of March, 1937

M. E. ALEXANDER,
Notary Public, Georgia State at Large.

(NOTARIAL SEAL)

EXHIBIT "B"—INDICTMENT

United States District Court

EASTERN DISTRICT OF KENTUCKY

June Term, 1935 - held at Lexington

The Grand Jurors of the United States of America, impaneled, sworn and charged to inquire within and for the Eastern District of Kentucky, upon their oaths do find and present:

That, heretofore, to wit: on and about the 17th day of May, 1934, before the finding of this indictment, in said Eastern District of Kentucky, and within the jurisdiction of this court, one Otha L. Lawson, Sherman Kidwell, Roy C. Norvell and Vannie Kelley late of said

Eastern District of Kentucky, unlawfully, wilfully and feloniously did possess a quantity of distilled spirits, to wit, 25 gallons more or less, of whiskey, without the immediate container thereof having affixed thereto a stamp denoting the quantity of distilled spirits contained therein and evidencing payment of all Internal Revenue taxes imposed on such spirits;

Contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

Liquor Taxing Act,
Title II, Sec. 201.

MAC SWINFORD,
United States Attorney

Filed in open Court this 11
day of June, A. D. 1935.

UNITED STATES DISTRICT COURT,
EASTERN DISTRICT OF KENTUCKY.
LEXINGTON.

UNITED STATES
vs.
5824
Sherman Kidwell
Roy C. Norvell

PLEA

Order entered June 18, 1935

The U. S. Attorney being present, defendants appear, are arraigned and enter pleas of guilty to the in-

dictment herein, and are committed to the custody of the Marshal to await the further order of the Court.

H. CHURCH FORD, *Judge.*

United States
vs.
5824
Otha L. Lawson
Sherman Kidwell

JUDGMENT

Order entered June 29, 1935

This cause coming on for sentence, the defendants having nothing further to say, are each sentenced to be committed to the custody of the Attorney General, or his authorized representative for confinement in an institution of the Reformatory or Penitentiary type for a period of Two (2) Years at Hard Labor, and they are now committed.

H. CHURCH FORD, *Judge*

COMMITMENT

DISTRICT COURT OF THE UNITED STATES

Eastern District of Kentucky

THE PRESIDENT OF THE UNITED STATES OF AMERICA

To the Marshal of the United States for the Eastern District of Ky.

GREETING:

WHEREAS, at the June term of said Court, 1935, held at Lexington, Kentucky, in the said district to-wit, on June 29, 1935 Sherman Kidwell was sentenced by said Court, upon a plea of guilty to be committed to the custody of the Attorney General of the United States or his authorized representative, for confinement in an institution of the Reformatory type, preferably the ———————— for and during the term or period of Two (2) years at hard labor beginning June 29, 1935 and to pay a fine to the United States in the sum of $..... and costs $..... and to stand committed until such fine and costs shall be paid, or until he shall otherwise be discharged by due course of law, for having Transported untaxpaid liquor, etc., in violation of Title 2, Sec. 201, U. S. C.

NOW, THIS IS TO COMMAND YOU, THE SAID MARSHAL, to take the body of the said Sherman Kidwell and commit the same pursuant to the above sentence.

WITNESS, the Honorable H. Church Ford, Judge of the District Court of the United States for the

Eastern District of Kentucky, this 29 day of June A. D. 1935.

S. W. STACEY, *Clerk*

By SPENCER L. FINNELL
Deputy Clerk

(SEAL)

RETURN

I have executed the within writ in the manner following, to-wit: On June 29, 1935, I delivered said Sherman Kidwell to the Jailor of the Fayette Co. Lexington, Ky., temporarily pending transfer to the institution designated for the service of sentence, and on July 12, 1935, I delivered said Sherman Kidwell to the Supt. of U. S. Industrial Reformatory at Chillicothe, Ohio, together with a copy of this commitment.

J. M. MOORE
United States Marshal, E. D. K.

By NEAL GUILFOILE, *Deputy*

Filed July 29, 1935.
S. W. Stacey, *Clerk U. S. District Court.*

CLERK'S CERTIFICATE

UNITED STATES OF AMERICA)
) ss:
EASTERN DISTRICT OF KENTUCKY)

I, A. B. ROUSE, Clerk of the United States District Court in and for the EASTERN District of KENTUCKY, do hereby certify that the annexed and foregoing is a true and full copy of the original Indictment, order plea of guilty, and order of sentence and Commitment in case of U. S. vs. Sherman Kidwell, No. 5824-Lexington docket now remaining among the records of the said Court in my office.

IN TESTIMONY WHEREOF, I have hereunto subscribed my name and affixed the seal of the aforesaid Court at Lexington this 3 day of March, A. D. 1937.

(SEAL) A. B. ROUSE
Clerk.

By FLORENCE DUNHAM *Deputy Clerk.*

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
AT FRANKFORT

United States, *Plaintiff*
vs. No. 5590
Sherman Kidwell, *Defendant.*

JUDGMENT AND SENTENCE

ENTERED BY JUDGE A. M. J. COCHRAN,

SEPTEMBER 27th, 1932.

It is adjudged by the Court that the defendant be confined in a U. S. Penitentiary, or Prison Camp, for the term of two years from this 27th day of Sept., A. D., 1932, and the Marshal is directed to deliver said defendant to the Warden of said Penitentiary or Prison Camp, so that sentence may be executed according to law.

PENITENTIARY MITTIMUS

ISSUED SEPTEMBER 27th, A. D., 1932.

DISTRICT COURT OF THE UNITED STATES

EASTERN DISTRICT OF KENTUCKY

THE PRESIDENT OF THE UNITED STATES OF AMERICA

To the Marshal of the Eastern District of Kentucky and to the Warden of the U. S. Penitentiary, in the City of Atlanta in the State of Georgia or of prison camp, GREETING:

WE COMMAND YOU, the Marshal to take the body of Sherman Kidwell and deliver him to the Warden of the said Penitentiary, and you the Warden of the said Penitentiary, are commanded to receive into your Penitentiary the body of him, the said Sher-

man Kidwell and him there safely keep for the full term of two years from this 27 day of Sept., A. D., 1932; at 10 o'clock A. M., and until he shall satisfy the United States in the sum of — — — — dollars, fine, also the sum of — — — — dollars, which to us in our said Court was adjudged for our costs in that behalf expended; the said Sherman Kidwell having plead guilty in our District Court of the United States, for the Eastern District of Kentucky, at Frankfort, of having Viol. Secs. 12 and 39 Title 27 U. S. C. A. unlawfully manufacturing and possessing property designed for manufacturing intoxicating liquors.

NOTE: Sentence to be served in penitentiary or prison camp and sentenced by said Court to said term of imprisonment and to pay said fine and costs, as appears to us of record; and how you shall have executed this writ make known to the Judges of our said Court, at the Federal Court Hall, in the City of Frankfort, on the first Monday in Nov. next, and have then and there this writ.

Witness, The Honorable A. M. J. Cochran, Judge of the District Court of the United States, at the City of Frankfort, this 27 day of Sept., A. D., 1932, and of our Independence the 157 year.

(SEAL) S. W. STACEY, *Clerk.*

By LILLIAN M. WIARD, *Deeputy Clerk.*

MARSHAL'S RETURN

Received Pen Mittimus at Lexington, Ky. on Oct. 1, 1932, and executed same on Oct. 5, 1932, by delivering the body of the within named Sherman Kidwell to Federal Reformatory Camp Petersburg, Va. together with copy of the within.

J. H. HAMMONS, *U. S. Marshal,*
By FLINT DAVIS, *Deputy.*

Mittimus Returned & Filed
October 21, 1932

S. W. STACEY, *Clerk,*

By LILLIAN M. WIARD, *Deputy Clerk.*

CLERK'S CERTIFICATE

EASTERN DISTRICT OF KENTUCKY)
) ss:
THE UNITED STATES OF AMERICA)

I, A. B. Rouse, Clerk of the United States District Court in and for the Eastern District of Kentucky, do hereby certify that the annexed and foregoing is a true and full copy of the original.

Judgment and Sentence and Final Mittimus in case of U. S. vs. Sherman Kidwell, No. 5590 now remaining among the records of the said Court in my office.

IN TESTIMONY WHEREOF, I have hereunto subscribed my name and affixed the seal of the

aforesaid Court at Frankfort this 16th day of March, A. D. 1937.

A. B. ROUSE
Clerk

(SEAL)

By SARA M. CADEN
Deputy Clerk.

ORDER GRANTING WRIT

Read and considered. Let the writ issue as prayed, returnable before me at Atlanta, Georgia, at 10:00 o'clock a. m. on the 27th day of March, 1937.

This the 26th day of March, 1937.

E. MARVIN UNDERWOOD,
U. S. Judge.

Filed in Clerk's Office
March 26th, 1937.
J. D. STEWARD, *Clerk,*
By W. L. NEESE, *Deputy Clerk.*

(TITLE OMITTED).

ANSWER

Now comes the respondent in the above-entitled proceeding, and in obedience to said writ, produces the body of the petitioner at the time and place directed therein and for cause of detention respectfully shows that he holds the petitioner under and by virtue of a

commitment issued by the District Court of the United States for the Eastern District of Kentucky, a copy of which is hereto attached and made a part of this response. Also attached hereto and made a part of this response is copy of petitioner's conduct record sheet on file in the Atlanta Penitentiary.

Wherefore, having fully answered, respondent prays the judgment of the court in the premises.

LAWRENCE S. CAMP,
United States Attorney.

HARVEY H. TYSINGER,
Assistant United States Attorney,
Attorney for Respondent.

NOTE: Mittimus omitted, same appears as exhibit to petition.

Filed March 27th, 1937

UNITED STATES PENITENTIARY

ATLANTA, GEORGIA.

CONDUCT RECORD

Record of Sherman Kidwell Color White No. 46682 Crime Violation Internal Revenue Law (Trans. Liq.) Sentence 2 years Fine $None Cost None Not Committed Received Aug. 23, 1935 Where convicted E. Ky-Lexington. Sentenced June 29-1935 Occupation Laborer- Age 24 Sentence commences June 29-1935

Ex.good time 14 Full term expires June 28-1937- Good time allowance 144 days. Short term expires Jan 21, 1937- Residence, Lexington, Ky. Eligible for parole Feb. 28-1936- Action of Parole Board March 27, 1936- "DENIED" By Trans. from U. S. I. R. Chillicothe, Ohio WANTED (a) to be held at Exp. of Sent. as Reg. No. 46682, as a Parole Violator from Fed. Ref. Camp, Petersburg Va. as Reg No. 1699-Lee; to be listed for hearing on Parole revocation at next meeting following expiration date of instant sentence. 1-21-37- Extra good time 14 Days 9-27-32-Sent. to 2 Years. 10-5-32-Recd at FRC. Petersburg, Va. 8-27-33 Paroled from there. 6-18-34-Declared Parole Violator as No. 1699-Lee, has 395 Days to serve if parole revoked. 6-29-35- Sent. to 2 Years. 8-23-35 received at U. S. P. Atlanta, Ga. as No. 46682. 1-21-37-sentence expired as No. 46682, 1-22-37, in custody to serve remainder of first sentence.

(TITLE OMITTED).

AMENDMENT TO ANSWER

Now comes the respondent in the above entitled proceeding, and with leave of the Court, amends his response heretofore filed, and says to the Court, as follows:

Respondent holds in his possession two warrants of commitment directing the incarceration of petitioner.

The first sentence was rendered by the U. S. District Court for the Eastern District of Kentucky on Sept. 27, 1932, and ordered imprisonment for a term of two years. On August 27, 1933 petitioner was released on parole. On August 23, 1935, petitioner was returned to the institution with a new sentence imposed by the same court, and directing incarceration for two years. On January 29, 1936, the predecessor of your respondent received a letter dated January 25, 1936, signed by Ray L. Huff, Parole Executive, enclosing a parole warrant for petitioner for violation of the parole granted under his first sentence. Said letter further directs that the said warrant be placed as a detainer, and that petitioner be taken into custody on the warrant at the expiration of the second sentence of one year and one day which he was then serving. The letter further instructed that the case should be listed for a hearing on the violation charge only after the prisoner is in custody on the warrant. These instructions have been strictly complied with in petitioners case.

On January 21, 1937, the second sentence of two years expired, and petitioner was then taken into custody to serve the remainder of his first sentence, which amounted to 395 days if his parole be revoked.

Respondent does not, of course, maintain that there are any directions in either sentence as to sequence of service; indeed, it would be impossible for the first sentence to provide for service after the second sentence which was passed nearly two years later.

Respondent attaches hereto and makes a part of this response photostatic copy of the letter above referred

to. The other material documents are attached as exhibits to the original response.

Wherefore, having fully answered, respondent prays the judgment of the court,

Respectfully submitted,

LAWRENCE S. CAMP,
United States Attorney,

HARVEY H. TYSINGER,
Assistant U. S. Attorney,

H. T. NICHOLS,
Assistant U. S. Attorney,

Counsel for Respondent.

ORDER ALLOWING AMENDMENT

The foregoing amendment to response is hereby allowed, subject to objection.

This 24th day of April, 1937.

E. MARVIN UNDERWOOD,
United States Judge.

PETITIONER'S EXHIBIT NO. 1—LETTER, RAY L. HUFF, JANUARY 25, 1936

SANFORD BATES
DIRECTOR

DEPARTMENT OF JUSTICE
BUREAU OF PRISONS
WASHINGTON

January 25, 1936

Mr. A. C. Aderhold,
Warden, U. S. Penitentiary,
Atlanta, Georgia.

Attention: Parole Officer.

In re: Sherman Kidwell,

Reg. No. 46682-A ZW

Dear Sir:

Enclosed herewith is parole violator warrant in duplicate and copy of referral for consideration of alleged violation in the case of the above named man who is now serving a new sentence in your institution.

Please place the warrant as a detainer and take Kidwell into custody on the warrant at the expiration of his present sentence. The case should be listed for a hearing on the violation charge only after Kidwell is in custody on the warrant.

When you have executed the warrant return it to this office stating specifically that you are holding

Kidwell as a violator and on the original commitment.

Very truly yours,

RAY L. HUFF
Parole Executive.

Filed April 24th, 1937.

(TITLE OMITTED).

OPINION AND ORDER SUSTAINING WRIT

Petitioner was sentenced on September 27th, 1932, in the United States District Court for the Eastern District of Kentucky, to serve a term of two years in a penitentiary or prison camp for violation of the National Prohibition Act.

He was released on parole on August 27th, 1933, and was declared to be a parole violator on June 18th, 1934. On the latter date, June 18th, 1934, a warrant was issued by the Chairman of the United States Board of Parole, which stated:

> "And whereas, satisfactory evidence having been presented to the undersigned Member of this Board that said paroled prisoner named in this warrant has violated the conditions of his parole, the same is hereby revoked and the said paroled prisoner is declared to be a fugitive from justice.
>
> "Now, therefore, this is to command you to execute this warrant by taking the said Sherman

Kidwell, wherever he is found in the United States, and him safely return to the institution hereinafter designated."

No institution was designated in the warrant, but there were added thereto the words: "When apprehended communicate with Director, Bureau of Prisons for instructions." On June 11th, 1935, petitioner was indicted, with others, in the same court for violating the Liquor Tax Act, and was sentenced by said Court on June 29th, 1935, the sentence being in the following language:

"This cause coming on for sentence, the defendants having nothing further to say, are each sentenced to be committed to the custody of the Attorney General, or his authorized representative for confinement in an institution of the Reformatory or Penitentiary type for a period of Two (2) Years at Hard Labor, and they are now committed."

Petitioner was committed on the same day to jail pending transfer to the United States Industrial Reformatory at Chillicothe, where he was received on July 12th, 1935. He was subsequently transferred to the Atlanta Penitentiary, where he was received on August 23rd, 1935.

On January 25th, 1936, the Parole Executive wrote the Warden of the Penitentiary at Atlanta the following letter:

"Mr. A. C. Aderhold,

Warden, U. S. Penitentiary,

Atlanta, Georgia.

Attention: Parole Officer.

In re: Sherman Kidwell,

Reg. No. 46682-A. ZW

"Dear Sir:

"Enclosed herewith is parole violator warrant in duplicate and copy of referral for consideration of alleged violation in the case of the above named man who is now serving a new sentence in your institution.

"Please place the warrant as a detainer and take Kidwell into custody on the warrant at the expiration of his present sentence. The case should be listed for a hearing on the violation charge only after Kidwell is in custody on the warrant.

"When you have executed the warrant return it to this office stating specifically that you are holding Kidwell as a violator and on the original commitment."

The record shows, therefore, that petitioner has been held under two sentences of the same court, in the same penitentiaries (at Chillicothe and Atlanta) from July 12th, 1935, until January 21st, 1937, when his second sentence expired, and from January 21st, 1937 until

the present time solely under the parole warrant and the letter of the Parole Executive.

When petitioner was declared to be a parole violator he had 395 days to serve on the first sentence. If, therefore, the first sentence began to run again when he was returned to the penitentiary and ran concurrently with the second sentence, then petitioner has completed the service of both sentences and is now being illegally held and should be discharged.

The Circuit Court of Appeals for the Fifth Circuit, in the case of *Aderhold v. McCarthy*, 65 F(92d) 452, said, in commenting upon sentences without any provision for one sentence to follow the other, even where the sentences were imposed by different courts, that "Each was imposed by authority of the United States, and was to be executed in the Atlanta penitentiary. There being nothing to prevent, each would begin to run on his arrival there, and he would be entitled to discharge at the expiration of the longest term.

This seems to be the settled law (*Zerbst v. Lyman*, (CCA 5th) 255 Fed. 609; *White v. Kwaitkowski*, (CCA 10th) 60 F(2d) 264; *Arnold v. McCarthy*, (CCA 5th) 65 F(2d) 452.)

The fact that the first sentence was, at the time of parole, being served in a different institution, is, as held by the Circuit Court of Appeals for the Tenth Circuit, in *White v. Kwaithkowski*, 60 F(2d) 264, wholly immaterial for, as the Court said: "To hold otherwise is to hold that the Attorney General may by transfer to the reformatory change concurrent to con-

secutive sentences; but he had no such judicial power." The Court further said in this case, "The new Board (Parole Board) had no power to return the appellee to Chillicothe, and did not attempt to do so. The remainder of the first sentence was served at Leavenworth, and it was satisfied."

In the McCarthy case the Circuit Court of Appeals for the Fifth Circuit held that the two sentences ran concurrently, although, as shown by the record, it was strongly contended that they should not because the sentences were imposed in different courts and in different states and because petitioner was never actually confined in a penitentiary under the commitment issued on one case, until after he had served his sentence in the other.

The case at bar presents even stronger grounds for the release of the prisoner than the McCarthy case, since here the sentences were imposed by the same court without providing that the cases should run consecutively, with full information of the previous sentence, either actual or readily obtainable from the United States Attorney under the present practice in United States courts.

Since the trial court did not make the sentences run consecutively, they must be held to run concurrently.

For stronger reasons, sentences could not be made to run consecutively by the mere act of the Parole Board.

The respondent contends that the parole has never been revoked. There was no evidence in this case to this effect, other than the above quoted letter of the Pa-

role Executive, and the warrant itself recites that the parole was revoked. However I do not think this material since petitioner's first sentence began to run again the moment he was received at the penitentiary and the failure of the Parole Board to comply with the law requiring it, "at the next meeting of the Board of Parole held at said prison after the issuing of the warrant for the retaking of any paroled prisoner" to grant a hearing and "then or any time in its discretion make an order to terminate said parole," would not operate to exclude from the computation of the sentence the time the prisoner was actually in the institution after his arrest and return to the custody of the United States, whether the parole was revoked or not. The fact he was also held under a commitment upon a concurrent sentence would make no difference. The law plainly contemplates that "only the time the prisoner was on parole" and not held under a sentence, that must be served in a different institution, should be excluded from the computation of the sentence. (L8 USCA Par. 719.) Otherwise the Parole Board, by either intentional or negligent omission to exercise its discretion to terminate the parole, which discretion must be a reasonable one, might indefinitely increase the sentence imposed. In this case the increase would be more than a year. Not even a court has the power to increase a sentence after it is once imposed, so certainly the Parole Board, which has no power to impose sentences, could not do so.

The illegality of the action of the Parole Board would be strikingly illustrated if, in the present instance, there had been no second sentence and petitioner had been returned to the penitentiary and left there

for two years before the revocation of his parole was considered, and then compelled, thereafter, upon a formal revocation of the parole, to serve the 395 days claimed to be left of his first sentence.

The second sentence, being under the law concurrent, did not affect the running of the first sentence, and the result, so far as the first sentence is concerned, would be the same as if there had been no second sentence.

I am of opinion, therefore, that petitioner's first sentence began to run again when he was received at the United States Reformatory at Chillicothe, Ohio, on July 12th, 1935, as shown by the Marshal's return on the commitment issued upon the second sentence.

Whereupon it is considered, ordered and adjudged that the writ of habeas corpus be and is hereby sustained, and that respondent discharge petitioner from custody at the expiration of three days from this date, which time is allowed for taking an appeal, if desired.

This the 13th day of May, 1937.

E. MARVIN UNDERWOOD,

United States District Judge.

Filed May 13th, 1937.

(TITLE OMITTED).

PETITION FOR APPEAL

TO THE HONORABLE E. MARVIN UNDERWOOD, JUDGE OF SAID COURT:

The above named respondent, Fred G. Zerbst, as Warden of the United States Penitentiary at Atlanta, Georgia, feeling himself aggrieved by the judgment and order of the Court made and entered in the above stated cause on the 13th day of May, 1937, wherein the writ of habeas corpus was sustained, and the petitioner was ordered discharged from custody, does hereby appeal from said judgment and order to the United States Circuit Court of Appeals for the Fifth Circuit, for the reasons specified in the assignment of errors, which is filed herewith, and prays that his appeal be allowed and citation issue as provided by law, and that a transcript of the record, proceedings and papers upon which said judgment and order were based, duly authenticated, may be sent to the United States Circuit Court of Appeals for said Circuit.

Appellant further shows that this appeal is prosecuted by and under the direction and authority of the Attorney General of the United States of America, and he, therefore, prays that said appeal may be allowed without bond.

LAWRENCE S. CAMP,
United States Attorney

HARVEY H. TYSINGER,
Assistant U. S. Attorney

H. T. NICHOLS,
Assistant U. S. Attorney

Filed May 14, 1937.

ORDER GRANTING APPEAL

The foregoing petition considered and the appeal is allowed as prayed; and the appeal being prosecuted by direction of the Attorney General of the United States; it is ordered that the same be allowed without bond being given by appellant.

It is further ordered that pending the determination of this appeal appellee shall be released on bail in the sum of $100.00 without sureties.

This 14th day of May, 1937.

E. MARVIN UNDERWOOD,
United States Judge

Filed May 14, 1937.

(TITLE OMITTED).

JUDGE'S CERTIFICATE AS TO THE EVIDENCE

I, E. Marvin Underwood, Judge of said Court, do hereby certify that at the hearing of the above-entitled proceeding the case was, tried upon the basis of the pleadings, consisting of the application for habeas corpus with exhibits attached and the response and amendment to response with exhibits annexed, together with the testimony of Ben F. Bates, who testified that he is Record Clerk of the Atlanta Federal Penitentiary, and otherwise testified to the beginning and expiration dates of petitioner's several sentences substantially as they are set out in the amendment to response, and

further that the writ of habeas corpus is not premature, but that, if the terms be computed as running concurrently, or, as petitioner alleges in his petition they should be, then petitioner would have been eligible for release from custody on Jan. 21, 1937. Said pleadings and exhibits and said testimony of Ben F. Bates are hereby settled as the evidence in the case.

This 18th day of May, 1937.

E. MARVIN UNDERWOOD,
United States Judge.

Filed May 18, 1937.

(TITLE OMITTED).

ASSIGNMENTS OF ERRORS

And now on this 14th day of May, 1937, comes the respondent by his counsel, Lawrence S. Camp, United States Attorney, Harvey H. Tysinger, Assistant U. S. Attorney and H. T. Nichols, Assistant U. S. Attorney, all of said District, and say that the judgment and order entered in the above stated cause on the 13th day of May, 1937, is erroneous:

(1). Because the court erred in ruling that the terms of petitioner's sentences shall run concurrently instead of consecutively.

(2). Because the Court erred in not ruling that the Parole Board's action was independent of the trial

court's jurisdiction of the parolee in the sentence imposed in the second case.

(3). Because the court erred in not ruling that the commission of a new federal crime by the parolee would not absolve the parolee from penalty for violation of parole.

(4). Because the court erred in ruling that the familiar rule of concurrency of sentences silent as to sequence of service is applicable to the case at bar, and in failing to rule that the Board of Parole's action to revoke the original sentence was independent of that of the new sentence imposed by the trial court.

(5). Because the court erred in failing to recognize that it was the legislative intent to vest the Board of Parole with authority to prescribe the punishment for violation of parole.

(6). Because the court erred in ruling that where a prisoner is released on parole, and is tried and sentenced for another offense afterward, which last sentence is silent as to order of service, and subsequently the convict is returned to the penitentiary, and serves the latter sentence, that the first sentence runs concurrently with the latter, and that the Parole Board has no power to hold its warrant as a detainer, and, after completion of the second sentence, to serve it on the prisoner and to compel execution of the unexpired portion of the parole sentence.

(7). Because under the undisputed facts as set forth in the petition for habeas corpus and in the answer of the respondent and the amendment to the answer,

the court erred in sustaining the writ of habeas corpus and in ordering the petitioner discharged from custody.

WHEREFORE the Respondent prays that the said judgment and order be reversed, and that the District Court be directed to discharge said writ of habeas corpus and to remand the petitioner to the custody of Respondent.

LAWRENCE S. CAMP,
United States Attorney

HARVEY H. TYSINGER,
Assistant U. S. Attorney

H. T. NICHOLS,
Assistant U. S. Attorney

Filed May 14, 1937.

(TITLE OMITTED).

PRAECIPE

TO THE CLERK OF THE ABOVE-ENTITLED COURT:

You will please prepare transcript of record in this cause, to be filed in the office of the Clerk of the United States Circuit Court of Appeals for the Fifth Judicial Circuit, under the appeal heretofore perfected to said

Court, and include in said transcript the following pleadings, proceedings and papers on file, to wit:

1. The original petition for habeas corpus with exhibits attached thereto and order allowing the same.

2. The response of the respondent and amendment thereto with exhibits attached.

3. The judgment and order of court of May 13th, 1937.

4. Petition for appeal and order of court allowing same.

5. Judge's certificate as to the evidence.

6. The assignment of errors.

7. This praecipe.

Said transcript to be prepared and transmitted to the United States Circuit Court of Appeals for the Fifth Judicial Circuit as prescribed by law and the rules of said Circuit Court of Appeals.

LAWRENCE S. CAMP,
United States Attorney

HARVEY H. TYSINGER,
Assistant U. S. Attorney

H. T. NICHOLS,
Assistant U. S. Attorney

Counsel for Respondent.

Filed May 14, 1937.

CLERK'S CERTIFICATE

UNITED STATES OF AMERICA)
)ss:
NORTHERN DISTRICT OF GEORGIA.)

I, J. D. Steward, Clerk of the District Court of the United States in and for the Northern District of Georgia, do hereby certify that the foregoing and attached pages contains a true, full, complete and correct copy of the original record, assignments of error and all proceedings had in the matter of—

FRED G. ZERBST, WARDEN, UNITED STATES PENITENTIARY, ATLANTA, GEORGIA, RESPONDENT, *Appellant*,

versus

SHERMAN KIDWELL, PETITIONER, *Appellee*.

as specified in the praecipe of counsel herein and as the same remains of record and on file in the clerk's office of the said District Court, at Atlanta, Georgia, except that the original citation with acknowledgement of service is included herein in the stead of a copy thereof.

IN TESTIMONY WHEREOF, I hereunto subscribe my name and affix the seal of the said District Court, at Atlanta, Georgia, this the 21st day of May, A. D. 1937.

(SEAL) J. D. STEWARD,
Clerk United States District Court, Northern District of Georgia,
By
C. A. McGREW, *Deputy Clerk.*

Original citation omitted from the printed record, the original thereof being on file in the office of the Clerk of the United States Circuit Court of Appeals.

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That thereafter the following proceedings were had in said cause in the United States Circuit Court of Appeals for the Fifth Circuit, viz:

Argument and submission

Extract from the Minutes of October 6, 1937

No. 8468

FRED G. ZERBST, WARDEN, UNITED STATES PENITENTIARY, ATLANTA, GEORGIA

v.

SHERMAN KIDWELL

On this day this cause was called, and, after argument by Bates Booth, Esq., Special Assistant to the Attorney General, for appellant, was submitted to the Court.

Opinion of the court and dissenting opinion of Sibley, Circuit Judge

Filed November 10, 1937

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 8468

FRED G. ZERBST, WARDEN, UNITED STATES PENITENTIARY, ATLANTA, GEORGIA, APPELLANT

v.

SHERMAN KIDWELL, APPELLEE

No. 8476

FRED G. ZERBST, WARDEN, UNITED STATES PENITENTIARY, ATLANTA, GEORGIA, APPELLANT

v.

DEWEY SMITH, APPELLEE

No. 8477

FRED G. ZERBST, WARDEN, UNITED STATES PENITENTIARY, ATLANTA, GEORGIA, APPELLANT

v.

ALLEN COLLINS, APPELLEE

No. 8478

FRED G. ZERBST, WARDEN, UNITED STATES PENITENTIARY, ATLANTA, GEORGIA, APPELLANT

v.

WALTER OWENS, APPELLEE

No. 8495

FRED G. ZERBST, WARDEN, UNITED STATES PENITENTIARY, ATLANTA, GEORGIA, APPELLANT

v.

FRANK PEEL, APPELLEE

No. 8516

FRED G. ZERBST, WARDEN, UNITED STATES PENITENTIARY, ATLANTA, GEORGIA, APPELLANT

v.

BENNIE JONES, APPELLEE

No. 8527

FRED G. ZERBST, WARDEN, UNITED STATES PENITENTIARY, ATLANTA, GEORGIA, APPELLANT

v.

HENRY STONE, APPELLEE

No. 8555

FRED G. ZERBST, WARDEN, UNITED STATES PENITENTIARY, ATLANTA, GEORGIA, APPELLANT

v.

JEFFIE D. SULLIVAN, APPELLEE

Appeals from the District Court of the United States for the Northern District of Georgia

November 10, 1937

Before FOSTER, SIBLEY, and HOLMES, Circuit Judges

FOSTER, Circuit Judge: These eight cases were argued and submitted together, present the same questions for decision, and may be conveniently disposed of by one opinion. The material facts common to all the cases are these: Appellees, while serving sentences in federal prisons, were released on parole or by reduction of their sentences for

good conduct. Before the maximum terms of their sentences had expired they committed federal offenses for which they were convicted and sentenced to imprisonment in the Atlanta penitentiary. The judgments were silent as to the time these second sentences were to begin. In each case, after the prisoner was incarcerated under the second sentence, a member of the Parole Board issued a warrant, directed to any federal officer authorized to serve criminal processes within the United States, reciting that satisfactory evidence had been presented to him that (the person named) had violated the condition of his release, was deemed to be a fugitive from justice, and commanding that the warrant be executed by taking the prisoner, wherever found in the United States, and returning him safely to the institution hereinafter designated. However, the warrant did not designate the institution. The warrants were sent to the warden of the Atlanta penitentiary with a letter instructing him to place the warrant as a detainer and to take the prisoner named into custody on the warrant at the expiration of his present sentence. The letter further instructed that the case should be listed for a hearing on the violation charge only after (the person named) is in custody on the warrant. The warrants were served and appellees were detained as instructed. Appellees were released on habeas corpus after each had served more time in the penitentiary after his return thereto than the remainder of his first sentence, without deducting any allowance for good conduct or the time he was at large on parole or conditional release before being returned to serve the second sentence.

There are some slight variations of the facts in each case. Illustrating these differences in the broadest way we may refer to the facts more in detail as appearing in the case of Sullivan, No. 8555. Sullivan was convicted in the Northern District of Alabama in May 1934, and sentenced to serve 22 months imprisonment. He was committed to the United States reformatory at Chillicothe, Ohio, was allowed a credit of 132 days on his sentence for good conduct and released. While at large he was again convicted in the same court and was sentenced to serve 18 months in the Atlanta penitentiary, that institution having been designated by the Attorney General. He was delivered to the Madison County jail on April 9, 1936, awaiting transportation to the Atlanta penitentiary, and was delivered to the latter institution on April 11, 1936. He was again granted credit for good conduct and his second sentence expired on June 22, 1937, at which time he had served 439 days in the Atlanta penitentiary. He was not released but was held in jail on a warrant issued by the Parole Board on March 17, 1936, awaiting a hearing as to the revocation of his conditional release on the first sentence. After a hearing he was ordered discharged on habeas corpus July 31, 1937. He had then been detained 39 days beyond the expiration of his second sentence.

There is no doubt the Parole Board had jurisdiction over the appellees when they were released from prison on their first sentences. Under the provisions of the Act of June 29, 1932 (47 Stat. 381; 18

U. S. C. A. 716b) prisoners granted a reduction of sentence for good conduct are provisionally released, subject to all the provisions of the parole laws.

It is immaterial whether appellees were conditionally released or paroled from prisons other than the Atlanta penitentiary. Under the provisions of the Act of May 14, 1920 (46 Stat. 326; 18 U. S. C. A. § 753f) in imposing sentences courts are restricted to specifying the type of institution in which the prisoner is to be confined and he is committed to the custody of the Attorney General, who designates the place of confinement. The various prisons are but units of a single system under the control of the Attorney General and he is authorized to transfer any prisoner from one institution to another for any reason sufficient to himself. White vs. Kwiatkowski, 60 F. (2d) 264.

It is the general rule that where a person is confined in an institution under two separate sentences they run concurrently, in the absence of any provision to the contrary. Aderhold vs. McCarthy, 65 F. (2d) 452.

Appellant makes no point as to the place of confinement and does not dispute the general rule as to the concurrence of sentences. However, it is contended in each case that the running of the original sentence was suspended during the period the prisoner was incarcerated on the second sentence; and that the parole laws confer on the Parole Board power to require consecutive service of sentences, notwithstanding the general rule. In support of this appellant relies upon Anderson vs. Corall, 263 U. S. 193.

The parole law was adopted by the Act of June 25, 1910 (36 Stat. 819). A separate parole board was created for each jail where federal prisoners were confined, with authority to grant parole after a prisoner had served one-third of a sentence exceeding one year. By section 4 of the Act (18 U. S. C. A. § 717), upon reliable information tending to show violation of parole the warden was authorized to issue his warrant for retaking the prisoner at any time within the term of the prisoner's sentence. Section 6 of the Act (18 U. S. C. A. § 719) provides as follows:

"At the next meeting of the board of parole held at such prison after the issuing of a warrant for the retaking of any paroled prisoner, said board of parole shall be notified thereof, and if said prisoner shall have been returned to said prison, he shall be given an opportunity to appear before said board of parole, and the said board may then or at any time in its discretion revoke the order and terminate such parole or modify the terms and conditions thereof. If such order of parole shall be revoked and the parole so terminated, the said prisoner shall serve the remainder of the sentence originally imposed; and the time the prisoner was out on parole shall not be taken into account to diminish the time for which he was sentenced."

The parole law was amended by the Act of May 13, 1930 (46 Stat. 272). In lieu of the various parole boards a single board of parole was created and all the powers theretofore vested in the various boards and the Attorney General were transferred to the new board. Section 3 of the Act (18 U. S. C. A. 723c) provides as follows:

"The Board of Parole created by section 723a of this title, or any member thereof, shall have the exclusive authority to issue warrants for the retaking of any United States prisoner who has violated his parole. The unexpired term of imprisonment of any such prisoner shall begin to run from the date he is returned to the institution, and the time the prisoner was on parole shall not diminish the time he was originally sentenced to serve."

In Anderson vs. Corall, supra, it appears that Corall was paroled from Leavenworth Penitentiary on February 24, 1916. On June 28, 1916, the warden issued a warrant for retaking him as a parole violator. Before he was retaken, in October 1916, he was convicted at Chicago for violation of a state law and sentenced to the Illinois State penitentiary, where he was confined until some time in December 1919. After his release from that prison he was retaken on the warden's warrant and, in January 1920, the Parole Board revoked his parole. It was held that parole did not suspend service or operate to shorten the term; that while on parole a convict remains in legal custody, under the control of the warden, until the expiration of his term; that Corall's violation of the parole and his confinement in the Joliet penitentiary interrupted his service in question and his status was in legal effect the same as if he had escaped from the control and custody of the warden; and that the Board was authorized, at any time during his term of sentence, in its discretion, to revoke the order and terminate the parole and require him to serve the remainder of the sentence originally imposed, without any allowance for the time he was out on parole. The case was decided by the Supreme Court November 12, 1923. It can not be considered a construction of the provisions of Section 3 of the Act of May 13, 1930, which was adopted thereafter. The case may be otherwise easily distinguished from those at bar. While confined in the Illinois prison Corall could not possibly have been considered as serving the balance of his federal sentence concurrently with the state sentence.

When appellees were delivered to the penitentiary at Atlanta the provisions of section 3 of the Act of May 13, 1930, immediately took effect and the unexpired portions of their first sentences began to run from that date. The province of the warrants was to secure the return of the prisoners. Since they were already in custody the issuance of the warrants was vain and useless. The warden held the prisoners under both sentences. In Hill vs. Wampler, 298 U. S. 460–465, it was said:

"A warrant of commitment departing in matter of substance from the judgment back of it is void. * * * Being void and not merely

irregular, its nullity may be established upon a writ of habeas corpus. * * * 'The prisoner is detained, not by virtue of the warrant of commitment, but on account of the judgment and sentence.' * * * If the judgment and sentence do not authorize his detention, no 'mittimus' will avail to make detention lawful."

By necessary implication section 3 requires the Parole Board to have a hearing on a parole violation at its first meeting after the prisoner is returned to custody. Cf. Escoe vs. Zerbst, 295 U. S. 490. Conceding that thereafter the Parole Board may delay entering the order of revocation in its discretion, the time in which that may be done is limited by the unexpired term of imprisonment. After the prisoner had paid the full penalty of the law it was necessary to revoke his parole and the Board was without jurisdiction to do so. It is argued on behalf of appellant that parole violators should be punished and that unless the Parole Board could defer the running of the sentence upon which he was paroled there would be no way to make the sentences run consecutively. The punishment provided by Congress for violation of parole is loss of good time and the time the prisoner may have been at large on parole. In many cases this would be a rather severe punishment. It is not the province of the Parole Board to amend the law by its rules and regulations or to take upon itself the imposition of punishment not provided by law.

The conclusion we reach is that in each case the first and second sentences ran concurrently from the day the prisoner was delivered to the Atlanta penitentiary on the second sentence; that the Parole Board was without authority to delay a hearing on the violation charge and to order that the sentence be served consecutively. In each case the appellee had served more than the remainder of the maximum term for which he was originally sentenced and was entitled to release on habeas corpus.

The judgments appealed from are affirmed.

SIBLEY, Circuit Judge, Dissenting: The conclusion reached by the majority makes impractical any real punishment for the federal offenses committed while out on parole. It is true that the violation of the parole is punished by a loss of good time on the old sentence and by having to serve it in full. But that is all punishment for the old offense and its incidents. It would be suffered whether there was a second federal offense or some other failure to keep parole. Suppose the remainder of the old sentence is two years, and the maximum sentence for the new offense is two years or less. If, as the Court holds, the sentences must be served concurrently, there is no real punishment for the new crime. The judge can do nothing effectual about it. He cannot terminate the parole or order the arrest of the prisoner as a parole violator, for exclusive power to do all that is expressly vested by Section 3 of the Act of May 13, 1930, in the Board of Parole and its members. If he should direct the new sentence to take effect on the completion of the old, would he release the

prisoner meanwhile? Could the prisoner thus be at large for years if the Board failed to act? Would it be right to leave the prisoner in this state of uncertainty? The judges here making the second sentences did what seemed to them their plain duty and their only function; they fixed a punishment for the new offenses and committed the prisoners for its service. The Parole Board, within its function of superintending the execution of the old sentences which had been interrupted by parole, thought parole had probably been violated, and if so the old sentences should be served in full as the parole statute expressly directs. This policy of the statute would not really be carried out by presently terminating the paroles and putting the old sentences into concurrent service with the new. It could only be done by postponing revocation of the paroles, indeed by postponing arrest and return to the penitentiary under the old sentences.

The Board accordingly issued warrants but suspended arrests. This I think was in their discretion under the circumstances and for the purpose disclosed. Section 6 of the Parole Act, 18 U. S. C. A. § 719, expressly says that at the next meeting at the prison after the issue of a warrant (which originally might have been issued by the Warden without knowledge of the Board) the Board shall be notified, and if the prisoner has been returned to prison he shall have opportunity to appear before the Board, "and the said Board may then or at any time in its discretion revoke the order and terminate such parole or modify the terms and conditions thereof." Here is express discretionary authority given to postpone the revocation of the parole. If the Board thinks a prisoner ought to serve the old sentence in full, as the Parole Act says he shall, after he has finished serving a new sentence, it can by postponing revocation accomplish it. Where the prisoner has been arrested on a parole warrant and committed to the penitentiary on it alone, he is, of course, serving his old sentence and not to be prejudiced by the Board's delay, but where he is not so committed, but on an independent charge, this does not follow. To prevent any contention that he is now serving the old sentence, the Board directed that arrest under the parole warrant to be postponed. I think this was within the Board's discretion also.

Since the warrant has been issued and the prisoner is in the prison, though not by virtue of the parole warrant, it may be that he has a right under the literal words of Section 6 to make a prompt showing before the Board on the question whether he has broken parole. He might otherwise lose his evidence. But that is not the question here. These prisoners have been turned loose as having served their old sentences while serving the new, contrary to the will and discretion of the Board, and that result it seems to me is not in accordance with law and justice.

Judgment

Extract from the Minutes of November 10, 1937

No. 8468

FRED G. ZERBST, WARDEN, UNITED STATES PENITENTIARY, ATLANTA, GEORGIA

v.

SHERMAN KIDWELL

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Northern District of Georgia, and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court, that the judgment of the said District Court appealed from in this cause be, and the same is hereby, affirmed.

SIBLEY, Circuit Judge, dissenting.

Clerk's certificate

UNITED STATES OF AMERICA.

United States Circuit Court of Appeals, Fifth Circuit.

I, Oakley F. Dodd, Clerk of the United States Circuit Court of Appeals for the Fifth Circuit, do hereby certify that the pages numbered from 34 to 46 next preceding this certificate contain full, true, and complete copies of all the pleadings, record entries, and proceedings, including the opinion of the United States Circuit Court of Appeals for the Fifth Circuit, in a certain cause in said Court, numbered 8468, wherein Fred G. Zerbst, Warden, United States Penitentiary, Atlanta, Georgia, is appellant, and Sherman Kidwell is appellee, as full, true, and complete as the originals of the same now remain in my office.

I further certify that the pages of the printed record numbered from 1 to 33 are identical with the printed record upon which said cause was heard and decided in the said Circuit Court of Appeals.

In testimony whereof, I hereunto subscribe my name and affix the seal of the said United States Circuit Court of Appeals, at my office in the City of New Orleans, Louisiana, in the Fifth Circuit, this 3rd day of December A. D. 1937.

[SEAL]

OAKLEY F. DODD,
Clerk of the United States Circuit Court of Appeals, Fifth Circuit.

U. S. GOVERNMENT PRINTING OFFICE: 1938

Supreme Court of the United States

Order allowing certiorari

Filed March 28, 1938

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice REED took no part in the consideration or decision of this application.

U. S. GOVERNMENT PRINTING OFFICE: 1938